



**Attorney General  
Betty D. Montgomery**

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

September 17, 1998

Ms. Magalie Salas  
Chairman  
Federal Communications Commission  
1919 M Street N.W., Room 222  
Washington, D.C. 20554

Re: *In the Matter of the GTE Telephone  
Operators GTOC Tariff No. 1 GTOC  
Transmittal No. 1148, CC Docket No. 98-  
79.*

Dear Ms. Salas:

Enclosed, please find the original and seven copies of the comments of the Public Utilities Commission of Ohio in reference to the above captioned docket. Please return one time-stamped copy in the enclosed self addressed, stamped envelope. We have also enclosed a 3.5 inch diskette containing the comments.

Thank you for your cooperation in this matter.

Respectfully submitted,

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<b>Operators</b> GTOC Tariff No. 1	)	CC Docket No. 98-79
GTOC Transmittal No. 1148.	)	

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**OPPOSITION OF THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**INTRODUCTION**

The ADSL service being proposed by GTE is local in nature, even when considered on an end-to-end basis. The entire provision of this regulated telecommunications service occurs on an intrastate basis. The FCC does not regulate the private network of networks known as the Internet. Consequently, the interstate character of the Internet is not a relevant consideration in determining the true interstate/intrastate nature of the proposed ADSL service. Relying on the characteristics of an unregulated private network such as Internet as the sole basis for regulating an otherwise local regulated service is a jurisdictional "house of cards." It also creates potential price squeeze problems because the FCC would regulate the price of ADSL and state commission's would regulate the wholesale prices for the underlying UNEs and service elements.

## BACKGROUND

On May 15, 1998, GTE filed Transmittal No. 1148 to establish GTE DSL Solutions-ADSL Service. On May 29, 1998, the Common Carrier Bureau released an order suspending the transmittal for one day and required GTE to keep an accurate accounting of all revenue received from its GTE DSL Solutions-ADSL Service. On August 20, 1998, the FCC released an Order designating two issues for investigation. The first issue in which the FCC seeks comment is the question of whether this offering is jurisdictionally an interstate service. The other question the FCC asks is whether this service should be tariffed at the state or federal level, regardless of jurisdiction, in order to reduce the possibility of a price squeeze. On September 8, 1998, GTE presented its Direct Case supporting its tariff application. The Public Utilities Commission of Ohio (PUCO) respectfully submits its comments for the FCC's consideration.

## RESPONSE TO GTE'S DIRECT CASE ARGUMENTS

- I. **The Proposed ADSL-Dedicated Service itself does not amount to an interstate service, either factually or legally, even if analyzed on an end-to-end basis. Instead, ADSL and other traffic locally exchanged between LECs and ISPs should continue to be subject to State regulation, as recently concluded by the FCC in ¶ 344 and ¶ 346 of the *Access Reform Order*.**

End-users, and their associated private networks, are not part of the end-to-end concept of a call. The regulated pieces of a call under the proposed ADSL service, the access and transport services, are clearly local in nature if the Internet Service Provider (ISP) is located in the local calling area (or intrastate if the ISP is

located within the state). What happens after the ISP's local point-of-presence occurs on what the FCC has defined as a private network, and as such, is not properly part of the jurisdictional consideration.<sup>1</sup>

GTE's own description of the proposed ADSL service demonstrates the local nature of the service. The service is described by GTE as "a high speed *access connection between an end user and the Internet* by utilizing a combination of the end user's existing local exchange physical plant (i.e. copper facility), specialized ADSL equipment and transport to the frame relay switch where the ISP connects to GTE's network." GTE Direct Case at 4 (emphasis added; footnotes omitted). Thus, it is undisputed that GTE's proposed service begins and ends on the local network, spanning from the customer's premise to the ISP's local point of presence.

GTE goes on to describe in detail the workings of the Internet communications that occur on "the other side" of the ISP's local point-of-presence. GTE Direct Case at 4-5. Those activities should not be relied upon by the FCC in constructing jurisdiction over ADSL services. The Internet protocol and technology existing today (as described by GTE) may be changed tomorrow, without regulatory approval,

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<sup>1</sup> The PUCO would like to make clear that, while it believes that the jurisdiction of this service is local, it is in no way opining on what it believes is the appropriate treatment of ISP bound or any other local traffic for compensation purposes. Recently, the PUCO had an occasion to enforce the terms of a negotiated interconnection agreement providing for a particular type of compensation for the exchange of traffic from an ILEC and a new-entrant LEC serving an ISP. *In the Matter of the Complaint of ICG Telecom Group v. Ameritech Ohio*, Case No. 97-1557-TP-CSS, August 27, 1998 Opinion and Order. The issue of generally deciding the appropriate compensation for the local exchange of such traffic outside the context of a previously negotiated agreement is a separate policy consideration that the PUCO anticipates it will have to address in a future proceeding.

and is not a static factor that should be relied upon to establish the FCC's jurisdiction. More importantly, the private "network of networks" known as the Internet is not regulated by the FCC as being provided by an interstate carrier or as an interstate communications service. As a related matter, the FCC has designated ISPs as end-users. *Access Charge Reform Order* at ¶ 342.

Factually, GTE has absolutely no involvement in the interstate transmission of voice or data signals across the ISP's private network or across the Internet. The actual interstate transmission of data across the Internet is directed and controlled exclusively by GTE's customer, the ISP. That interstate traffic is separate and distinct from the local access connection provided by GTE. Even GTE admits that it is required to offer the identical service "under state regulation" where a customer desiring ADSL service had no Internet connectivity. *GTE Direct Case* at 4 (note 10). GTE characterizes that scenario as being a "truly intrastate service." *Id.* From a regulatory perspective, however, there is no difference between the two situations. An end-user's ability to further engage in unregulated interstate communications over a private network is immaterial, where the only regulated service being offered, even when considered on an end-to-end basis, is local in nature.

Considering ADSL on an "end-to-end" basis, both "ends" of GTE's service are found within its local network, and GTE's service merely transmits voice and data on a local basis. It is undisputed that GTE is *not* involved in the transmission of voice or data over the Internet or to any point beyond delivering it to the ISP's local point-of-presence. Yet, GTE relies heavily upon the technical characteristics of the Internet. *GTE Direct Case* at 14-19. GTE should not be permitted to rely upon the

private, unregulated activities of its end user customers as the driving force and outcome-determinative factor in establishing the FCC's jurisdiction over GTE's tariffed, regulated service.

The PUCO acknowledges the revolutionary character of the Internet, and understands that the Internet poses unique regulatory and jurisdictional problems that have never before been faced. Yet, an example by analogy may serve to illustrate the PUCO's perspective on this matter. Electronic banking transactions are completed thousands of times daily —*both on local telephone lines and on the Internet.*

A local telephone subscriber can make a local call to his/her bank, using a telephonic interface to communicate with the bank's computer and access the customer's checking account. Routinely, such a customer might order the bank, for example, to pay several bills or execute other electronic fund transfers. The bank's computer completes the requests through electronic transactions in the interstate banking system, automatically and seamlessly making the transfers. The fact that the customer has caused a transaction in interstate commerce through this local telephone call does not transform the local call into an interstate call. The nature of the regulated wire communication, from a regulatory perspective, is purely local in nature. Of course, many commercial banks also offer "electronic bill pay" services through Internet sites that are used to complete the same type of interstate banking transactions.

Likewise, a customer using local exchange telephone service to access the Internet by way of their ISP typically initiates intermittent requests to the ISP's com-

puter server that result in an interstate transmission of data by the ISP. It is the ISP's computer server that chooses when to include the customer's request, for example, to download a particular page of data from a website. Just like the electronic banking customer, the typical Internet user might initiate a dozen or so such requests during the course of a single online session. During the entire time an Internet user is passively viewing text or graphics (once a webpage is loaded), there is virtually no activity being performed for that user by the ISP's computer server. Of course, this aspect of an asynchronous frame relay service, along with the fact that the data is sent in batches over the Internet, contributes to the high efficiency of an ADSL service.

It is important for the FCC to recognize that, although GTE has emphasized that its ADSL service will be used to connect to ISPs, the service actually has much broader applications. Most LECs have been selling their ADSL service, not just to connect to ISPs, but also for residential and small business customers to connect to Enhanced Service Providers, and other data networks, such as corporate LANS. As referenced above, GTE apparently concedes that serving such end-users that have no Internet connectivity would "clearly" be subject to regulation by a State commission, rather than the FCC. GTE Direct Case at 4 (note 10). The PUCO believes that the FCC should consider jurisdictional issue regarding this service, and the effects of Federal rates on the use of this service, in a much broader perspective than just connection to ISPs.

Another important non-Internet aspect of ADSL is the voice channel that is bundled with the service. At this time, the PUCO is uncertain whether GTE is permitting a voice channel to be provisioned as part of this service. If local voice is

part of GTE's proposed ADSL service and it is tarified at the FCC, that would completely eviscerate the jurisdictional cornerstone of the Communications Act, 47 U.S.C. § 152(b). As the Eighth Circuit recently emphasized after the passage of the 1996 Act, Section 152(b) remains a "Louisiana fence built hog tight, horse high and bull strong" preventing the FCC from asserting jurisdiction over intrastate telecommunications services. *Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 (8<sup>th</sup> Cir. 1997).

Allowing the bundling of local voice service with any interstate service in a way that so blatantly infringes on the jurisdiction of State commissions over local voice telephone service would be the ultimate usurpation of the dual regulatory structure created by Congress, and would unwisely stage a serious jurisdictional conflict with the States. GTE's footnote 10 appears to concede that non-Internet ADSL services would clearly be subject to State regulation. However, GTE's proposed tariff is structured in such a way that the customer who uses GTE's DSL service to connect to an ISP, as well as to LANS, ESPS, etc., must buy the service out of the FCC tariff. This clearly goes farther than necessary. Because GTE has yet to file a tariff relating to ADSL services in Ohio, it simply is not clear how this issue would be addressed. At a minimum, the FCC should make it clear that State commission jurisdiction over local voice services and other non-ISP traffic going over this service is unaffected by this docket.



The judicial decisions relied upon by GTE in its Direct Case are distinguished from the situation presented by GTE's proposed ADSL service and, in fact, support the conclusion that the proposed service is local in nature. All of the cases relied upon by GTE support the notion that jurisdiction over a *regulated* communication is determined by the interstate or intrastate nature of the communication, not the location of the underlying network facilities. See GTE Direct Case at 8-10. Because the only service being regulated by either the FCC or State commissions is ADSL, not Internet service, the end-to-end regulated service is purely local.

The cases relied upon by GTE are distinguished from the issues being examined in this docket regarding ADSL service. The "nature of the communication" doctrine is rooted in the dual regulatory structure created by Congress for interstate and intrastate wire communications. The doctrine is used to determine the "dividing line between the regulatory jurisdictions of the FCC and states." *National Association of Regulatory Utility Commissioners v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984). In other words, it is the nature of the *regulated* communications that are considered in resolving regulatory jurisdictional issues as between the FCC and State commissions. After all, the "nature of the communications" doctrine also applies to determine whether certain telecommunications services are subject to State jurisdiction to the exclusion of FCC jurisdiction.

The cases relied upon by GTE involve situations where Courts have rejected arguments that sub-components of a particular regulated interstate service should be considered separately, either to establish that States would have jurisdiction over

part of the service<sup>2</sup> or to establish that a service was non-jurisdictional to the FCC.<sup>3</sup> None of those cases involved a local service that related to a private unregulated interstate network such as the Internet. Of course, the purpose of the "nature of communications" doctrine is to preserve the integrity of the FCC's jurisdiction over interstate telecommunications, consistent with the Supremacy Clause, and displace any State jurisdiction over regulated interstate communications. Where the FCC has no jurisdiction over the underlying interstate service related to a local service, there is no basis to utilize the Supremacy Clause or attempt to preempt the State regulation of that local service.

To date, the FCC has not exercised regulatory jurisdiction over Internet

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<sup>2</sup> See *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694, 700 (1st Cir. 1977) (FCC jurisdiction extends to PBX service because the underlying purpose of preemption under the Supremacy Clause is to ensure that regulated interstate services are not subject to State regulation to the exclusion of FCC jurisdiction); *New York Tel. Co. v. FCC*, 631 F.2d 1059 (2nd Cir. 1980) (foreign exchange service subject to FCC regulation, to the exclusion of State regulation, in order to enforce Federal prohibition against discrimination in interstate communications); *Petition for Emergency Relief and Declaratory Ruling by BellSouth Corp.*, 7 FCC Rcd. 1619 (1992) (state regulation of "jurisdictionally mixed" voice mail service is preempted where intrastate calls are practically inseverable from interstate calls).

<sup>3</sup> See *United States v. AT&T*, 57 F.Supp. 451 (S.D.N.Y. 1944) (hotel surcharges on interstate calls through a PBX violated FCC tariff but not existing State tariff, because no surcharges were assessed on local calls made through the PBX and because hotel surcharges amounted to regulated resale of public utility service); *General Tel. Co. v. FCC*, 413 F.2d 390, 397 D.C. Cir. 1969) (subcomponents of interstate broadcast signal should not be considered separately); *California Interstate Tel. Co. v. FCC*, 328 F.2d 556 D.C. Cir. 1964) (regulated microwave service not intrastate where facilities used in one State were part of interstate/foreign communication); *Idaho Microwave v. FCC*, 352 F.2d 729 (D.C. Cir. 1965) (FCC jurisdiction extends to regulated interstate microwave service, even where facilities of one provider are within one state); *MCI v. AT&T*, 369 F.Supp. 1004 (E.D.Pa. 1974) (in-state facilities that are part of an interstate transmission network subject to FCC jurisdiction).

communications as interstate communications.<sup>4</sup> Likewise, State commissions do not regulate Internet communications. In enacting the Telecommunications Act of 1996 (1996 Act), Congress placed the FCC and State commissions on equal footing in this regard, by providing that the free market that presently exists for the Internet should remain “unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2) (West 1998). Unlike the cases reinforcing the concept emphasizing the “true nature of the communication,” the entirety of the regulated service at issue in this case and underlying facilities are undisputedly local. Basing the FCC’s jurisdiction entirely on an unregulated and separable interstate communication (*i.e.*, Internet communications by ISPs) is a jurisdictional “house of cards.”

GTE also argues that the FCC’s consistent refusal “to subdivide communications into jurisdictional segments” supports an interstate classification of the proposed ADSL service. GTE Direct Case at 10-14. GTE again fails to acknowledge that the FCC does not regulate the Internet. As a result, there are no jurisdictional subdivisions. There is the local regulated ADSL service and the unregulated Internet service; the jurisdictional question is whether ADSL should be regulated by the FCC or the States.

Similarly, GTE argues that the inseparability doctrine requires the FCC to regulate ADSL. GTE Direct Case at 14-19. This argument is based on the notion that

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<sup>4</sup> GTE makes much of the fact that the FCC has, on various occasions, characterized Internet traffic as interstate in nature. GTE Direct Case at 19-23. The interstate character of Internet traffic is not in complete dispute. GTE fails to acknowledge that the Internet itself is not regulated by the FCC, and that it should be the interstate or intrastate nature of *regulated* services that determines whether the FCC or States have jurisdiction.

it is impossible to segregate the intrastate traffic from the interstate traffic on the Internet. Again, this argument misses the fact that the relevant and necessary "separation" with ADSL is separating the regulated service from the unregulated. In regulating GTE's local ADSL service, it is not necessary to separate different types of traffic going over the Internet itself—traffic which GTE has absolutely no involvement in or control over and which is not being regulated. GTE's regulated service being proposed, ADSL, is local in nature, as the FCC has recently acknowledged in the *Access Charge Reform Order*.

Ironically, GTE relies upon the decision to continue the so-called ISP "exemption" from access charges found in the FCC's *Access Charge Reform Order*. GTE Direct Case at 20-21. In the *Access Charge Reform Order*, however, the FCC decided that ISPs should continue to purchase services "under the same intrastate tariffs available to end-users," and directly concluded that "the existing pricing structure for ISPs should remain in place." *Access Charge Reform Order* at ¶ 342. In response to ILEC arguments that ISPs should be forced to pay access charges, the FCC concluded as follows: "To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators." *Id.* at ¶ 346. Thus, it is clear that GTE cannot claim that the *Access Charge Reform Order* concluded ISP traffic is subject to the FCC's jurisdiction. To the contrary the *Access Charge Reform Order* represents a very recent decision by the FCC that directly reinforces the notion that traffic between an ILEC and an ISP is local in nature.

## **II. Tariffing ADSL at the Federal Level Creates a Risk for Price Squeeze**

The PUCO believes that it is appropriate that GTE's ADSL service be tariffed at the state level. Even setting aside the jurisdictional arguments discussed above, the PUCO believes the FCC should defer tariffing of the service to the States. This is not an issue of competency or "doing one's job" as GTE implies. GTE Direct Case at 24. There is a real potential for harm whenever a service, and its wholesale inputs (*e.g.*, UNEs), are priced according to two different costing methodologies. It is very important that the cost standard used for the pricing of UNEs be the same as that for the pricing of retail services. It is only in this way that one can be assured that market activity is occurring in an appropriate manner.

As the FCC is well aware, issues like investment figures and overhead allocators are not the only issues that influence cost floors and, thus, the price of UNEs and retail services. There are also other charges, typically referred to as the non-recurring charges and "glue" charges, which must also be considered when costing and pricing retail services and their underlying UNE counterparts. It is only by being able to examine the inputs to the total price of both services that one can be certain that both new entrant LECs and incumbent LECs are being given a fair chance to compete.

Moreover, because the primary competitive alternative for ADSL service to an ISP is ordinary local telephone service, there is an additional competitive concern —particularly given that GTE apparently does not intend to disrupt the intrastate treatment of non-ISP ADSL customers or non-ADSL local traffic terminating to an ISP. It is undisputed that State commissions set rates for local

service, conversely, the FCC is prohibited from doing so under 47 U.S.C. § 152(b) and the *Iowa Utilities Board* decision. Thus, if the FCC asserts jurisdiction over ADSL service used by ISPs, the anomalous situation arises where competing services are regulated by different jurisdictions. This creates a potential for direct competition on different, rather than equal, footing.

Lastly, contrary to what GTE stated in its Direct Case, cost data submitted to the PUCO would not be "readily available for public inspection and review by competitors, regulators, and customers alike." GTE Direct Case at 25. The PUCO affords confidential protection and proprietary treatment of cost data received in its proceedings. As a result, it is not likely that end-users or IXCs would get to review any of GTE's cost data, or that new entrant LECs would get to see GTE's retail cost data.

## CONCLUSION

In closing, the PUCO and its Staff wish to thank the FCC for the opportunity to file comments in this docket.

Respectfully submitted,

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